

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

STEVEN SCHREIBER, :  
Plaintiff, :  
v. : 15-CV-6861 (CBA)  
EMIL FRIEDMAN, et al, : April 5, 2016  
Defendants. : Brooklyn, New York

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE JAMES ORENSTEIN  
UNITED STATES MAGISTRATE JUDGE

## APPEARANCES:

For the Plaintiff:	JAY P. NELKIN, ESQ. CAROL NELKIN, ESQ. Nelkin & Nelkin 5417 Chaucer Houston, Texas 77005
For the Defendant:	PAUL H. SCHAFHAUSER, ESQ. Herrick Feinstein LLP One Gateway Center Newark, New Jersey 07102
For E&I, et al.:	DAVID GRANTZ, ESQ. Meyner & Landis One Gateway Center Newark, New Jersey 07102
For Birnbaum, et al.:	MAURICE W. HELLER, ESQ. Garvey, Shubert, Barer 100 Wall Street New York, New York 10005

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3 APPEARANCES CONTINUED:

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5 For Ezell, et al.: RICHARD A. FINKEL, ESQ.  
6 Abrams, Garfinkel, Margolis,  
Bergson  
237 West 35th Street  
7 New York, New York 10001

8 For 24 Hour Oil, et al.: BRIAN K. STEINWASCHER, ESQ.  
9 Thompson & Hine  
335 Madison Avenue  
10 New York, New York 10017

11

12 For Hersko, et al.: ANDREW W. GEFELL, ESQ.  
13 Abrams, Garfinkel, Margolis,  
Bergson  
237 West 35th Street  
New York, New York 10001

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Court Transcriber: SHARI RIEMER, CET-805  
16 TypeWrite Word Processing Service  
211 N. Milton Road  
17 Saratoga Springs, New York 12866

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1 (Proceedings began at 9:34 a.m.)

2 THE COURT: Good morning everybody. It's Judge  
3 Orenstein. We're on the record in Schreiber v. Friedman, 15-  
4 CV-6861.

5 Counsel, would you state your appearances, please,  
6 starting with the plaintiff.

7 MR. NELKIN: This is Jay Nelkin for the plaintiff  
8 Steven Schreiber.

9 THE COURT: Good morning.

10 MS. NELKIN: And Carol Nelkin for the plaintiff.

11 THE COURT: Good morning.

12 MR. SCHAFHAUSER: Good morning, Your Honor. Paul  
13 Schafhauser of Herrick Feinstein for the defendants Emil  
14 Friedman and New York Best Coffee, Inc.

15 THE COURT: Good morning. Anyone else?

16 MR. GRANTZ: Good morning, Your Honor. David Grantz  
17 from the law firm of Meyner & Landis on behalf of E&J Funding,  
18 E&I Investors and E&J Management.

19 THE COURT: Good morning. Is there anyone else on  
20 the line?

21 MR. HELLER: Good morning, Your Honor. Maury Heller  
22 of the firm of Garvey, Schubert Barer for the defendants  
23 Solomon Birnbaum, Office Coffee Services, LLC.

24 THE COURT: I'm sorry. Whoever just spoke start  
25 again because I couldn't hear you.

1                   MR. HELLER: This is Maury Heller for the defendants  
2 Solomon Birnbaum, Office Coffee Services, LLC, Single Serve  
3 Beverages Distribution, Crazy Cups and 26 Flavors, LLC.

4                   THE COURT: Good morning.

5                   MR. FINKEL: Good morning, Your Honor. Richard  
6 Finkel. I represent Sylvia Ezell, Sonya Rivera and Jorge  
7 Salcedo.

8                   THE COURT: Good morning. Anyone else?

9                   MR. STEINWASCHER: Good morning, Your Honor. Brian  
10 Steinwascher from Thompson & Hine LLP for defendants 165  
11 Street Realty Corp., 24 Hour Oil Delivery Corp.

12                  THE COURT: I'm sorry, sir. Who --

13                  MR. STEINWASCHER: Associated Fuel Oil Corp.

14                  THE COURT: Sorry, folks. I didn't realize we'd be  
15 having everybody on the phone or I would have brought people  
16 in because it's hard to have this many people on the phone.

17                  Whoever just spoke, please speak again.

18                  MR. STEINWASCHER: Your Honor, it's Brian  
19 Steinwascher from Thompson & Hine LLP for defendants 165  
20 Street Realty, 24 Hour Oil Delivery, Associated Fuel Oil,  
21 Light Trucking, MB Fuel Transport, MB Fuel Transport One, Park  
22 Avenue Associates and John Ahearn.

23                  THE COURT: Mr. Steinwascher, are you on the docket?

24                  MR. STEINWASCHER: I'm not, Your Honor. Mr. Waller  
25 is normally on for us. He asked me to step in last minute. I

1 can enter an appearance if necessary.

2 THE COURT: Please do so. Anyone else?

3 MR. GEFELL: Good morning. Andrew --

4 THE COURT: From now on --

5 MALE VOICE: Your Honor, I cannot hear you. I'm  
6 sorry. Very difficult to hear you.

7 [Pause in proceedings.]

8 THE COURT: Okay. After --

9 MALE VOICE: There is one more here.

10 THE COURT: After Mr. Steinwascher, who else?

11 MR. GEFELL: Andrew Gefell from the firm Abrams,  
12 Garfinkel, Margolis, Bergson for Jeffrey Hersko and Jeffrey  
13 Hersko PC.

14 THE COURT: I'm sorry. Who is it for Mr. Hersko?

15 MR. GEFELL: Andrew Gefell.

16 THE COURT: How do you spell your last name?

17 MR. GEFELL: G-E-F-E-L-L.

18 THE COURT: Are you on the docket yet, Mr. Gefell?

19 MR. GEFELL: Yes.

20 THE COURT: All right. Anyone else? Is that  
21 everybody?

22 Forgive me, folks, I hadn't anticipated everybody  
23 would be participating only because it seems to be a limited  
24 issue between Mr. Schafhauser's client and the plaintiff but  
25 all right.

1                   So Mr. Schafhauser, I'll hear you on your motion.

2                   MR. SCHAFHAUSER: Thank you, Your Honor. As Your  
3 Honor will recall, we appeared -- we actually had made a  
4 motion to stay discovery on the merits which was returnable  
5 before Your Honor on February 2nd and that motion was -- I  
6 think it's safe to say denied or Your Honor more I think,  
7 correctly I think denied it and held that discovery as to all  
8 parties should proceed.

9                   Your Honor I'm sure is aware that we appealed that  
10 determination to Judge Amon and on March 9 there was a hearing  
11 before Judge Amon and Judge Amon directed that document  
12 exchange as to all parties should proceed and that a  
13 deposition of Mr. Friedman would be held as to two issues  
14 outlined in Her Honor's docket entry, namely that there would  
15 be discovery as to Mr. Friedman's relationships with the other  
16 defendants and secondly, that the arbitrability of the claims  
17 at issue in this case would also be subject to discovery.

18                   THE COURT: Sorry to interrupt.

19                   MR. SCHAFHAUSER: That discovery --

20                   THE COURT: Sorry to interrupt but that was a  
21 limitation --

22                   MR. SCHAFHAUSER: No problem.

23                   THE COURT: The limitations in Judge Amon's orders  
24 were limitations beyond those that I had imposed; correct?

25                   MR. SCHAFHAUSER: Those were -- yes, those were --

1           THE COURT: That's what I thought.

2           MR. SCHAFHAUSER: Those were limitations. That's  
3 correct, Your Honor.

4           THE COURT: Go ahead.

5           MR. SCHAFHAUSER: And that request for discovery as  
6 to those issues was made by plaintiff who asserted that there  
7 were a number of fact issues with respect to the scope of the  
8 arbitration agreement between our respective clients as well  
9 as with respect to other issues relating to arbitration, i.e.  
10 the parties interactions with the various [inaudible] to date  
11 and whether or not Mr. Schreiber relied on the [inaudible]  
12 and/or a decision of the Bastin [inaudible] and whether as a  
13 result Mr. Friedman should be estopped. Those were the  
14 positions that were taken I believe both before Your Honor as  
15 well as before Judge Amon by Mr. Schreiber.

16           We, following the hearing before Judge Amon on March  
17 9, asked Mr. Schreiber's counsel to produce Mr. Schreiber for  
18 a deposition as to the same issues as to which he sought and  
19 obtained the deposition of Mr. Friedman and Mr. Schreiber's  
20 counsel declined which of course leads to this application.

21           The issue as we see it is this, Your Honor. We are  
22 presented with a plaintiff who has made the argument both to  
23 Your Honor as well as to Judge Amon that he is entitled to  
24 discovery as to arbitration related issues because plaintiff  
25 believes that there are fact issues. By the way --

1           THE COURT: I'm sorry. I'm sorry to jump in but --

2           MR. SCHAFHAUSER: No problem. Of course.

3           THE COURT: I thought the plaintiff wanted full  
4 discovery; correct?

5           MR. SCHAFHAUSER: The plaintiff certainly did want  
6 full discovery.

7           THE COURT: Okay. So --

8           MR. SCHAFHAUSER: That's also correct.

9           THE COURT: Right. So it's not that plaintiff said I  
10 want discovery on particular issues. It was -- the defense  
11 wants full discovery. You wanted to limit it and ultimately  
12 you prevailed on that; correct?

13           MR. SCHAFHAUSER: I don't think that's exactly the  
14 way it arose, Your Honor, because --

15           THE COURT: No? Because I ordered full discovery.

16           MR. SCHAFHAUSER: I moved --

17           THE COURT: Excuse me. Did I not order full  
18 discovery?

19           MR. SCHAFHAUSER: Your Honor ordered full discovery.

20           THE COURT: And then you appealed; right?

21           MR. SCHAFHAUSER: I did.

22           THE COURT: And on appeal you prevailed by getting  
23 limitations. It wasn't everything you wanted obviously but  
24 you prevailed to the extent that you got limitations on the  
25 discovery that I had not imposed.

1                   MR. SCHAFHAUSER: In that sense, correct, yes, but --

2                   THE COURT: In that sense meaning in the sense that  
3 it recounts the facts of this case, procedural facts.

4                   MR. SCHAFHAUSER: Well, I -- yes, but I don't think  
5 it recounts all of them, Your Honor, with all due respect.

6                   THE COURT: I see.

7                   MR. SCHAFHAUSER: Because -- the answer is yes but a  
8 qualified yes because there are other aspects to what occurred  
9 as well and that is that --

10                  THE COURT: What limitations did Mr. Nelkin seek on  
11 discovery?

12                  MR. SCHAFHAUSER: Mr. Nelkin took I think two  
13 alternative positions.

14                  THE COURT: I'm sorry, sir, please answer my question  
15 if you would. What limitations on discovery did Mr. Nelkin  
16 seek?

17                  MR. SCHAFHAUSER: He sought no limitations.

18                  THE COURT: Thank you. Go ahead.

19                  MR. SCHAFHAUSER: Mr. Nelkin sought no limitations  
20 but Mr. Nelkin took I believe the alternative position that if  
21 any limitations were to be imposed at the very least he is  
22 entitled -- and he took this position in letters to Your Honor  
23 as well in submissions and argument to Judge Amon. He took  
24 the position that if any limitations were to be imposed that  
25 in that event he at the very least should be allowed to obtain

1 discovery as to arbitration related issues and that's --  
2 that's what was granted by Judge Amon.

3 So it's correct that Mr. Nelkin in the general sense  
4 took the position that no limitations of discovery should be  
5 imposed as to any party but in the alternative he took the  
6 position that if any limitations were imposed he nonetheless  
7 has to have discovery as to the threshold arbitration issue  
8 because plaintiff took the position that there were fact  
9 issues as to those issues.

10 Having taken that position, and I understand that  
11 Mr. Schreiber through counsel has taken the position that  
12 we're estopped, I respectfully submit that the estoppel goes  
13 the other way because plaintiff took the position that there  
14 are fact issues regarding arbitration. Plaintiff took the  
15 position that he intended to pursue those issues through a  
16 deposition and plaintiff took the position that the scope as  
17 well as the enforceability of the arbitration agreement  
18 between my clients was at issue due to facts which he intended  
19 to present.

20 I believe as a matter of fairness and equity, Your  
21 Honor, it's appropriate that plaintiff be subjected to the  
22 same limited discovery that plaintiff sought and obtained  
23 based on the arguments that he successfully advanced to Judge  
24 Amon on.

25 THE COURT: Thank you.

1                   MR. SCHAFHAUSER: That's --

2                   THE COURT: Mr. Nelkin. I'm sorry, Mr. Schafhauser,  
3 were you not done?

4                   MR. NELKIN: Thank you, Your Honor.

5                   THE COURT: I'm sorry. Wait, Mr. Nelkin. Mr.  
6 Schafhauser, were you not done?

7                   MR. SCHAFHAUSER: I wasn't quite done --

8                   THE COURT: Please do.

9                   MR. SCHAFHAUSER: -- Your Honor, because I wanted to  
10 add one other thing and that is that subsequent to the  
11 determination by Judge Amon plaintiff in fact filed a motion  
12 regarding arbitration issues on March 18th in which a number  
13 of new facts have been presented and that motion I gather is  
14 pending now as well and that motion wasn't even pending at the  
15 time of these positions but that motion further amplifies the  
16 need I respectfully submit for discovery.

17                  Plaintiff cannot have it both ways in which he  
18 asserts that discovery is a one way street as to issues that  
19 he claims are fact issues. Thank you, Your Honor.

20                  THE COURT: Thank you. Mr. Nelkin.

21                  MR. NELKIN: Yes. Thank you, Your Honor. We would  
22 argue, Your Honor, that the defendant has repeatedly taken the  
23 position that no discovery was needed. We quoted in our  
24 letter Mr. Schafhauser saying that at least with respect to  
25 his client there could be no argument that there was any

1 discovery as to arbitrability. We have repeatedly sought this  
2 discovery. Mr. Schafhauser's clients have repeatedly opposed  
3 this discovery before Your Honor, before Judge Amon, and at  
4 each [inaudible] when they've been given the chance to ask for  
5 this discovery they have failed to do so and in fact actively  
6 opposed it which has caused the plaintiffs to have to  
7 repeatedly respond to their motions and answer their appeals  
8 on this matter.

9 So we think that those as a matter of fairness and  
10 estoppel that they should be barred from asking for discovery  
11 that they've repeatedly told this court they personally don't  
12 need and that they repeatedly opposed.

13 We also would argue that Judge Amon had taken all of  
14 this into account and granted them the discovery that they  
15 requested at the hearing. They asked for the original order  
16 or the original ruling was that only Mr. Friedman's deposition  
17 would go forward and then they asked the court for document  
18 discovery and she granted that at the very end of the hearing.

19 So we just think that in light of the cases that we  
20 cited such as Angelino that the defendants have taken the  
21 position, made a tactical decision that they didn't need  
22 discovery, put the plaintiff through expense, [inaudible] a  
23 lot of effort and now they're opposing it.

24 We also think they're actually moving tomorrow on  
25 their own volition which they obviously don't need this stuff

1 for, they told us [inaudible] they're prepared to move forward  
2 on that date and -- so the issues that they claim they need  
3 discovery for they're getting ready to file a motion on  
4 tomorrow that they obviously don't need the discovery for.

5 So I think the whole history here and the precedent  
6 that tracks that history that they should be estopped and  
7 barred from this.

8 Now, we also argued and went through this in our  
9 letter that on the different types of arguments that they've  
10 raised to this court as to what they're seeking they don't  
11 need this discovery. They haven't, unlike the plaintiffs,  
12 made any allegations that there were improper [inaudible] or  
13 payments with the [inaudible] for instance. They've taken the  
14 position before this court that there's no issue as to  
15 arbitrability with respect to them.

16 The other defendants haven't even sought any of the  
17 discovery. It's just Mr. Friedman's client -- I'm sorry, Mr.  
18 Schafhauser's clients that are seeking it and so for the  
19 reasons that we laid out in our letter as to why this type of  
20 discovery isn't required for their -- the arguments that  
21 they've asserted I think that it's inappropriate given the  
22 circumstances and the history here for them to be allowed to  
23 basically say never mind and now [inaudible] on discovery  
24 after we've lost -- or actually we won the appeal to limit  
25 discovery.

1                   THE COURT: Thank you. All right. Does anybody else  
2 wish to be heard?

3                   MR. SCHAFHAUSER: Your Honor, may I briefly reply?

4                   THE COURT: Yes.

5                   MR. SCHAFHAUSER: Thank you, Your Honor. The  
6 position that the Friedman defendants took was there's no  
7 doubt we've always taken the position that discovery should be  
8 stayed because Mr. Friedman believes he has a right to  
9 arbitration and I think it's safe to say that I've been  
10 singularly unsuccessful in that argument that all discovery  
11 should be stayed.

12                  THE COURT: I wholly disagree that you've been  
13 singularly unsuccessful. Mr. Schafhauser, don't sell yourself  
14 short. You have not been singularly unsuccessful. You  
15 obtained a partial reversal of my discovery order because  
16 Judge -- Judge Among agreed with you that discovery should not  
17 go forward in all respects but should be limited.

18                  MR. SCHAFHAUSER: Correct. And I --

19                  THE COURT: That's perfectly fine. But please, don't  
20 mischaracterize the record. The court --

21                  MR. SCHAFHAUSER: Well, no, I was --

22                  THE COURT: No. And it's important because the court  
23 has not denied you -- all of your arguments. You have  
24 prevailed on some of your arguments and that's an important  
25 part of this record in addressing this motion. So I don't

1 want there to be any misunderstanding about the record. You  
2 have not been singularly unsuccessful. You have obtained  
3 relief on the basis of your arguments. Please go ahead.

4 MR. SCHAFHAUSER: Thank you. I was about to say that  
5 yes, Judge Amon did limit the discovery as it does not relate  
6 to the arbitration issue, Your Honor, but Judge Amon did  
7 require discovery as to Mr. Friedman regarding the arbitration  
8 issue.

9 THE COURT: And at the argument --

10 MR. SCHAFHAUSER: What I was saying --

11 THE COURT: At the argument where you obtained that  
12 success did you seek Mr. Schreiber's deposition?

13 MR. SCHAFHAUSER: The answer is I did not raise it at  
14 that time.

15 THE COURT: Didn't you in fact at that argument say  
16 you needed no discovery on arbitrability? Did you say that?

17 MR. SCHAFHAUSER: I took the -- I took the position,  
18 Your Honor, that the agreement between my client and Mr.  
19 Schreiber was clear on its face and that I did not believe  
20 that any discovery was warranted by either side and that's  
21 what I was trying to say a moment ago. As to that argument I  
22 was unsuccessful, not successful. I was unsuccessful because  
23 Judge Amon disagreed with me that there were no discovery  
24 issues with regard to arbitration.

25 THE COURT: In that argument, sir --

1                   MR. SCHAFHAUSER: I was unsuccessful.

2                   THE COURT: In that argument, sir, did you say to  
3 Judge Amon look, if you're going to give them this discovery  
4 we need discovery beyond paper discovery; we also need if it's  
5 going forward on arbitrability we also need Mr. Schreiber's  
6 deposition? Did you make that argument?

7                   MR. SCHAFHAUSER: Your Honor, as I said a moment ago,  
8 I did not raise that issue before Judge Amon. I did not  
9 believe -- I did not. The answer is no. I did not raise the  
10 argument at that moment, no, because the way the hearing went  
11 I did not raise that issue. So I'm not going to tell Your  
12 Honor --

13                  THE COURT: Mr. Schafhauser, you will not persuade me  
14 that you are at all shy about raising arguments that you  
15 believe to be in your client's best interest. You're too good  
16 a lawyer for that and I've seen it first hand.

17                  MR. SCHAFHAUSER: Thank you, Your Honor, but I've  
18 answered the question twice. I did not raise the argument.  
19 I'm not going to tell Your Honor I raised an argument that I  
20 didn't raise. But what I'm suggesting to Your Honor is that I  
21 don't believe that the fact that it wasn't raised then should  
22 preclude -- should preclude my client from discovery now that  
23 the plaintiff is obtaining discovery from my client as to  
24 these same issues and has raised these fact issues, Your  
25 Honor, as issues that plaintiff suggests require a fact

1 determination by the court. As to the --

2 THE COURT: All right. Thank you.

3 MR. SCHAFHAUSER: Excuse me, Your Honor?

4 THE COURT: I said thank you.

5 MR. SCHAFHAUSER: Thank you.

6 THE COURT: So look, I want to start with that very  
7 last part, Mr. Schafhauser, when you say now that the  
8 plaintiff has obtained this discovery. I think that  
9 implicitly, and I don't mean to suggest that you're doing this  
10 intentionally, but I think it does misrepresent the record  
11 because it's not something that has just happened. What  
12 happened was I thought that what makes most sense for this  
13 case and is permissible is full discovery and I continue to  
14 think that would be most efficient and of course if we were  
15 proceeding in that way there's no question that you would get  
16 the plaintiff's deposition.

17 But you made an argument as is your right and as is  
18 your client's interest and you prevailed on that argument.  
19 The argument you made was I don't need arbitration discovery  
20 but at least limit to that and you prevailed and at that time  
21 nearly a month ago Judge Amon said paper discovery on  
22 arbitration and Friedman's deposition and you did not then  
23 argue oh, but also Schreiber's deposition. I don't think  
24 anything has changed in any material sense that the effect of  
25 the analysis since then.

1                 Judge Amon ordered that general document discovery  
2 may proceed as to both sides and Friedman's deposition may go  
3 forward as to two subjects. I agree with the plaintiff that  
4 the parties are not in identical positions with respect to  
5 what deposition discovery of the principles would provide  
6 that's pertinent to the issue of arbitrability and so while  
7 you are of course correct, Mr. Schafhauser, that both sides  
8 have the same rights and should be treated in the same way  
9 that does not mean that the principle should be applied  
10 unthinkingly to say well, if one person is deposed another  
11 person should be. That isn't how it works.

12                 Both sides, all parties frankly should be subject to  
13 providing discovery to the issues that are being litigated.  
14 Right now in terms of deposition discovery we're limiting it  
15 to arbitrability and I just don't see -- I don't agree with  
16 Mr. Schafhauser that the areas that you've identified as what  
17 Mr. Schreiber should testify about are in play the same way  
18 that they are for Mr. Friedman's testimony. So for that  
19 reason I'm denying the motion.

20                 Is there anything else for today, folks?

21                 MR. FINKEL: Your Honor, most respectfully, Your  
22 Honor said just now --

23                 THE COURT: Can you identify yourself, sir? Please  
24 identify yourself, sir.

25                 MR. FINKEL: Yes, I did.

1           THE COURT: Who is it?

2           MR. FINKEL: This is Richard Finkel speaking.

3           THE COURT: Go ahead, Mr. Finkel.

4           MR. FINKEL: Your Honor just said, I say this most  
5 respectfully, that the circumstances since Mr. Schafhauser  
6 made his argument have not changed. Most respectfully I  
7 disagree with Your Honor.

8           THE COURT: Your disagree is noted.

9           MR. FINKEL: Circumstances have changed.

10          THE COURT: Mr. Gefell -- Mr. Finkel --

11          MR. FINKEL: The circumstances has changed.

12          THE COURT: Your disagreement is noted but you have  
13 no motion pending.

14          MR. FINKEL: Very well, Your Honor.

15          THE COURT: Thank you all folks. Have a very good  
16 day.

17          (Proceedings concluded at 10:01 a.m.)

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.



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6 Shari Riemer, CET-805

7 Dated: April 20, 2016

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